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No. 77-691

In the Supreme Court of the United States

OCTOBER TERM, 1977

SUPREME COURT OF ILLINOIS,
HONORABLE DANIEL P. WARD, et al.,

Petitioners,

vs.

BASIL D. KTSANES,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether a petition to the Illinois Supreme Court requesting a waiver of a provision of one of its rules is a case or controversy within the meaning of Article III of the Constitution of the United States.

STATEMENT

This case was commenced by a complaint in the United States District Court for the Northern District of Illinois, seeking declaratory relief and an injunction

against the Petitioners here restraining them from enforcing the provisions of Rule 705(d) of the Rules of the Supreme Court of Illinois. That rule provides that an attorney cannot be admitted to practice in Illinois on a foreign license, even though he/she has met all of the other requirements for admission on a foreign license, if that attorney has previously taken the Illinois Bar examination and failed it. Prior to this proceeding the Respondent here petitioned the Supreme Court of Illinois to waive that provision of its rules. The petition was denied. Thereafter, the Respondent directly attacked the rule in the United States District Court by this proceeding. At no time before the Illinois Supreme Court, did the Respondent make any attempt to litigate the question presented to the Court.

ARGUMENT

The case, as decided by the United States Court of Appeals, turned on a narrow question to which the Petitioners here have completely failed to address themselves. That question is whether the original petition to Supreme Court of Illinois for a waiver of its rules was a case or controversy within the meaning of Article III of the Constitution of the United States. The Court of Appeals for the Seventh Circuit determined that that petition was not a case or controversy and therefore the Supreme Court of the United States could not have reviewed the question of the correctness of the decision of the Illinois Supreme Court, and the Court of Appeals further concluded that this attack on the rule of Court does not constitute a review of any decision made by the Supreme Court of Illinois in its judicial capacity.

As the Court of Appeals recognized in its petition the case is controlled by the decision of this Court *In Re Summers,* 325 U.S. 561.

In *Summers,* the Petitioner had attempted to gain admission to the Illinois Bar and was denied admission because of his conscientious objection to taking an oath to support the Constitution of Illinois.

The case there arose out of the refusal of the Committee on Character and Fitness, appointed by the Supreme Court of Illinois, to certify the good character of the Petitioner Summers. Summers then petitioned to the Supreme Court of Illinois attacking this refusal of the Committee on Character and Fitness and the Supreme Court of Illinois denied Summers petition to be admitted notwithstanding the unfavorable report of the Committee on Character and Fitness. It was from that decision of the Supreme Court of Illinois that Summers sought review in this Court.

The justices of the Supreme Court of Illinois contended that there was no case or controversy within the meaning of the provisions of Article III of the Constitution of the United States. In rejecting that contention this Court stated:

> A case arises within the meaning of the Constitution when any question respecting the Constitution, treatise or laws of the United States has assumed "such a form that the judicial power is capable of acting on it." *Osborne* v. *Bank,* 9 Wheat. 738, 819.
>
> The Court was then considering the power of the Bank to sue in the Federal court. The declaration on rights as they stand must be sought not on rights which may arise in the future, *Prentice* v. *Atlantic Coast Line Company, Co.,* 211 U.S. 210, 226, and there must be an actual controversy over an issue, not a desire for an abstract declaration of law. *Muskrat* v. *United States,* 219 U.S. 346, 361; *Fairchild* v. *Hughes,* 228 U.S. 126, 129. The form of the proceeding is not significant. It is the nature and effect which is controlling. *Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U.S. 249. (325 U.S. at pp. 566, 567.)

Later, the Court added:

> "A claim of a present right to admission to the bar of a State and a denial of that right is a controversy. When the claim is made in a State court and a denial of the right is made by a judicial order, it is a case which may be reviewed under Article III of the Constitution when Federal questions are raised and proper steps taken to that end in this Court." (325 U.S. at pp. 568, 569.)

The Court of Appeals in this case, in its opinion, concluded:

> In the instant case we have exactly the opposite set of circumstances. When Ktsanes petitioned the Illinois court, the petition was merely one for exemption from the rule, not a challenge of it. There was no

> 'claim of a present right to admission to a bar of a State and a denial of that right' which the *Summers* court held to create a case or controversy under Article III. *Summers, supra.* at 568. Ktsanes never argued the question of the validity of Rule 705(d) before the Illinois Supreme Court. He was asking for ministerial action, not judicial determination. The denial of his petition was made by the Court acting in an administrative capacity. See, *Law Students Research Counsel* v. *Wadmond,* 401 U.S. 154, 158 n.9 (1971); Lathrop v. Donohue, 367 U.S. 820, 827 (1961). That denial did not present a case or controversy cognizable by an Article III court and, thus, was not appealable to the Supreme Court of the United States.

A case of similar import is *Lathrop* v. *Donohue,* 367 U.S. 820 (1961) in which the Supreme Court of Wisconsin entered an order integrating the Bar of Wisconsin. The question before the Supreme Court of the United States was whether the order was a statute for the purposes of 28 U.S.C. § 1257(2). In *Lathrop* the Court, although divided on the question of whether Wisconsin could compel an attorney to pay dues to an organization taking positions to which he was opposed, recognized the legislative characteristics of the order and the lack of its judicial quality.

Here the Supreme Court of Illinois exercising its inherent power to regulate the practice of law has adopted a series of rules for admission to the Bar. The refusal of the Illinois Court to waive its rule in this regard was not a judicial act after a hearing or adversary proceeding.

Perhaps the leading case on the question of the jurisdiction of a Federal Court in a case such as this is *Law Students Civil Rights Research Council, Inc.* v. *Wadmond,* (S.D.N.Y. 1969), 299 F. Supp. 117. In that case certain law students and others attempted to have struck down certain requirements and procedures for admission to the bar of the State of New York. The defendants were two

of the Appellate Divisions of the Supreme Court of the State of New York, the Committees on Character and Fitness of the two divisions of the Supreme Court, and the justices and the members thereof. The question of jurisdiction was presented and Judge Friendly, speaking for the Court, stated as follows:

> We fail to perceive what interest would be served by holding Federal courts to be powerless to enjoin state officers from acting under a statute that allegedly deprives citizens of rights protected by the Civil Rights Act or promulgating regulations that are alleged to have that result simply because some of them are robed and others have been appointed by those who are. Rather it would seem anomalous that while Federal courts could entertain a complaint similar to the plaintiffs if made with respect to other licensed professions, such as medicine or accountability, they are powerless with respect to admission to the bar. The grant of injunctive relief in a case like this would not have in terrorem effect on state judges that the threat of a subsequent damage action would have; rather, it would furnish a definitive ruling on a point of Federal law for their future guidance, and, would not infringe the policy expressed in the Federal anti-injunction statute, 28 U.S.C. §2283, proscribing injunctions that would stay court "proceedings in a State court."

In the above-cited case, the District court of three judges granted only a small portion of the relief sought and an appeal was taken pursuant 28 U.S.C. §1253, directly to this Court. This court, in *Law Students Civil Rights Research Council, Inc.* v. *Wadmond*, 401 U.S. 154, 91 S.Ct. 720, perfunctorily affirmed the jurisdiction of the District Court. 401 U.S. 154, 158, N. 9.

A case containing similar facts in some respects to the present case is *Keenan* v. *Board of Law Examiners of the State of North Carolina* (E.D.N.C. 1970) 317 F. Supp. 1350, in which certain persons made application for an

admission to the bar of North Carolina and said applications were not acted upon because the applicants had not met the North Carolina residency requirement.

The three-judge district court in *Keenan* disposed of the contention that the plaintiffs there were in effect seeking review of a matter that came within the peculiar competence of the North Carolina courts by stating as follows:

> "These plaintiffs do not challenge a state court's disposition of an individual case; their personal circumstances merely furnish concreteness to a class action attacking a general rule as facially unconstitutional. Their assertion that they have been excluded from the practice of their profession in violation of the equal protection clause of the 14th Amendment is sufficient to allege a claim for relief under the Civil Rights Act, 42 U.S.C. §1983, and under 28 U.S.C. §1343(3). The right not to be so excluded is secured to them by the Constitution. Schware v. Board of Bar Examiners [353 U.S. 232, 77 S.Ct. 752 (1957)]. We therefore reject the Board's challenge to our jurisdiction over the subject matter of this case."

The court in *Keenan* also referred to Mr. Justice Frankfurter's concurrent opinion in *Schware* in which he defined the distinction between the review of the individual case and the review of general conditions for admission as follows:

> "Admission to practice in a state and before its courts necessarily belongs to the State. Of course, legislation laying down general conditions of an arbitrary or discriminatory character may, like other legislation, fall afoul of the 14th Amendment * * * A very different question is presented when this court is asked to review the exercise of judgment in refusing admission to the bar in an individual case, such as we have here. It is beyond this court's function to act as overseer of a particular result of a procedure established by a particular state for admission to its bar." 353 U.S. at 248, 77 S.Ct. at 761.

It is clear from the record in this case that no exercise of judgment was involved in the refusal of the defendants bar examiners or justices of the Supreme Court to admit the plaintiff on a foreign license. They were merely administering the rules of court pertaining to the admission to the bar as they were promulgated by the Supreme Court of Illinois. It is those rules rather than any specific action in a specific case that are being questioned here.

The Petitioners contend that principles of comity require that the federal courts abstain from action in this case. None of the cases relied upon by the Petitioners may be so construed.

Judice v. *Vail*, ... U.S. ....., 97 S. Ct. 1211, clearly limits its doctrine to pending cases. As the Court said, quoting from *Ex Parte Young*, 209 U.S. 123 (1908):

> But the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court. * * * 209 U.S., at 162.

The operative word here is "case" and "pending." As the Court of Appeals correctly held, there was no "case" and therefore the Federal Courts are not interfering in a State case much less a pending state case.

As we have stated above this case is merely an attempt to have a rule of the Supreme Court of Illinois declared unconstitutional. The question presented is neither insubstantial nor frivolous, and the Court of Appeals was correct in ordering the convening of a Three Judge District Court.

Conclusion

For the above and foregoing reasons, the petition for a writ of certiorari ought to be denied.

Respectfully submitted,

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